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SELECTED DECISIONS

OF THE

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CASE No. 112.

TSHAKA *v.* BETYI.

BUTTERWORTH: 20th September, 1950. Before J. W. Sleigh, Esq. (President), Messrs. A. M. Blakeway and C. C. Elston, Members of the Court (Southern Division).

Succession to land—Duty on Native Commissioner to summon all witnesses who can throw any light on the matter—Which tribal customary Law to be applied—Fingo law of succession —Widow requires permission to leave her deceased husband's kraal—Whether permission must be express or can be implied.

Under Fingo law, a widow may not leave her deceased husband's kraal without the permission of her deceased husband's heir.

Where the succession to land was in dispute and where the tribe to which the parties belonged was not stated but both parties resided in and the land in question was situate in the predominantly Fingo district of Tsomo.

Held: (1) That Fingo customary Law was to be applied.

Where the respondent was born to the widow of the late Nkumbi some years after the latter's death and while the widow was residing away from her late husband's kraal.

Held: (2) That the onus was on respondent to prove that despite his apparent illegitimacy he was the lawful heir of his mother's late husband.

Where the widow twice left her late husband's kraal, the respondent being born after the second departure, and there was no direct evidence that she had permission to do so.

Held: (3) That in terms of Government Notice No. 1664 of 1929, the Native Commissioner was bound to summon all witnesses who could throw any light on the matter.

Held: (4) That it could be inferred from the circumstances that the widow had permission when she first left her late husband's kraal but that permission for the second departure could not, on the evidence, be so readily inferred.

Held: Accordingly that the record be returned for further evidence and a fresh finding.

Certain factors from which permission may be inferred discussed.

Appeal from the Court of the Native Commissioner Tsomo.

Per Sleigh (President) (Dissenting): I have had the advantage of reading the judgment of my brother Blakeway. I, however, do not consider it necessary to remit the case for further evidence since the parties were legally represented in the court below and we must assume that all the evidence which was readily available was adduced.

Since the case may come back on appeal it will be wrong for me at this stage to analyse the evidence and to indicate whether the Native Commissioner's judgment is right or wrong. But the Native Commissioner should bear in mind that he must come to a decision on such evidence as may be available, whether the widow had Dlangeva's permission to reside at her peoples kraal on the occassion that she conceived and gave birth to respondent. His attention is invited to the case already mentioned by my brother Blakeway and to the following cases:—

Hahe *v.* Nokaviloti [1941 N.A.C. (C & O) 115].
Tyali *v.* Dalibango [1942 N.A.C. (C & O) 58].
Djerman *v.* Morris and Ano. [1 N.A.C. (S) 132].

Per Blakeway (Member): Appellant in this matter has appealed against the finding of the Assistant Native Commissioner in an enquiry held in terms of Government Notice No. 1664 of 1929 to determine the heir to Garden Lot No. 280 situate in Location No. 6, District of Tsomo.

There were two claimants: Appellant and respondent, and the Assistant Native Commissioner found in favour of respondent.

The admitted facts are that Cingani (Respondent) was born to the widow of the late Nkumbi some years after the latter's death and while the widow was residing away from her late husband's kraal. The garden lot in question was registered in the name of Dlangeva Tshaka of whom Nkumbi was the eldest son. Failing male issue of Nkumbi, Msontshi (appellant) would be the heir.

As the claimants appear to reside on and the land is situated in the District of Tsomo, which is accepted predominantly by fiingos, Fingo customs are to be applied. In the case of Mbulawa Gade *v.* Nkohla Gqagqeni [1944 N.A.C. (C & O) 85] the assessors stated the Fingo custom as follows:—

"1. In Fingoland a son born to a widow after the death of her husband can succeed to his father's or his grandfather's estate if born either at the late father's kraal or at the grandfather's kraal.

2. He is still heir by custom even if he is born at his mother's people's place provided that the mother has gone to her people's place with the consent of her late husband's people."

The point for decision therefore was whether Nkumbi's widow returned to her people with the consent of her late husband's people.

In argument before this Court it was contended that specific consent was not necessary and the fact that the woman was *putumaed* coupled with the fact that refund of dowry was not claimed tended to show that she was not repudiated and that this would amount to consent to her residence away from her husband's kraal.

This matter was referred to the Native assessors in the present case who unanimously stated "After a man dies the widow is bound by Native Custom which prevents her leaving the kraal without the permission of her husband's heir".

The whole question of the heirship to the late Dlangeva's estate is at stake and the matter might better have been dealt with as an action for a declaration of rights in which case pleadings would have been filed and each party would have known what case it had to meet. However, the matter came before the Native Commissioner as an enquiry in regard to the land only and the rules in regard to such an enquiry are set out in par. 3 (3) of Government Notice No. 1664 of 1929, in terms of which the Native Commissioner "shall summon before him all the parties concerned and such witnesses as he may consider necessary". Without pleadings the Native Commissioner is unable to determine what witnesses are necessary until he hears the evidence. Should the heirship to the land be determined on the evidence of the witnesses summoned by the Native Commissioner, the unsuccesful claimant would then be debarred from bringing an action, with additional evidence, for delivery of other estate property, which might be of far greater value, to which he might be able to show a right.

In determining the heirship to a land therefore the Native Commissioner should call all witnesses who can throw any light on the matter and enable him to come to a decision after the fullest investigation.

In the present case the Assistant Native Commissioner has called the parties, each supported by two witnesses. There was an onus on the respondent to prove that in spite of his apparent illegitimacy he was in fact according to Native Custom the lawful heir to Nkumbi. He is unable to show by direct evidence that his mother had the permission of her husband's people to return to the kraal of her people but it can be inferred from the circumstances that she did have such permission when she first left her husband's kraal. It is alleged for respondent that he was born after she had left her husband's kraal for the second time and the granting of permission for this visit cannot be so readily inferred. A factor which might have assisted the Court to determine this was whether respondent was brought to the kraal of Dlangeva or not. If the Court could be satisfied on this point it would clearly point the direction in which the truth lies as appellant and his witnesses assert that respondent never lived at Dlangeva's kraal. If they are untruthful in this respect the whole of their evidence is discredited.

Further factors which would assist the Court are: (*a*) the kraal at which respondent was born, (*b*) the proving of the allegation by respondent that he has already exercised the rights of an heir by demanding dowry for his sister Tutelwa, (*c*) an investigation of appellant's allegation that the widow of Nkumbi was married to Bly, (*d*) a satisfactory explanation of the failure to demand a return of dowry if this was believed to be the case, and (*e*) if the belief was not well-founded why no claim was made to Mfusi's dowry.

I feel that the Assistant Native Commissioner should have considered evidence on these points necessary and that in disposing of the question on the meagre evidence before him he has not carried out the directions of the regulation referred to.

In my opinion the case should be returned to the Court below for the calling of evidence on the points indicated and the recording thereafter of a fresh finding.

Per Elston (Member): I concur with the judgment delivered by my brother Blakeway.

Per Sleigh (President): The appeal is allowed, the judgment of the Court below is set aside and the record of proceedings is returned for further evidence on the points indicated and for a fresh finding. The costs of this appeal to abide the final determination of the case.

CASE No. 113.

GEBE *v.* TSHIKA.

BUTTERWORTH: 20th September, 1950. Before J. W. Sleigh, Esq. (President), Messrs. A. M. Blakeway and C. C. Elston, Members of the Court (Southern Division).

Section ten (3) *of Act No.* 38 *of* 1927—*Cause of action arising in area—Situation of kraal not part of cause of action against kraal head.*

Where defendants, alleged to be kraalhead and inmate respectively of a kraal in the Willowvale District, were sued by plaintiff in the Native Commissioner's Court, Idutywa, for damages for seduction and pregnancy, the seduction and intercourse resulting in pregnancy having taken place in Idutywa.

Held in an appeal by the kraal head, that section *ten* (3) of Act No. 38 of 1927, providing that a Native Commissioner's Court for an area shall have no jurisdiction in any case unless *inter alia* "the cause of action in that case arose in that area" must be interpreted as meaning "arose wholly in that area".

Held further that the whole cause of action arose in the Idutywa District and that the situation of the kraal was irrelevant.

Feld and East London Cinema (Pty.), Ltd. *v.* Mavjee, 1944 CP.D. 520, followed.

Appeal from the Court of the Native Commissioner, Idutywa.

Per Sleigh (President): In an action for damages for seduction and pregnancy, plaintiff, the father of the girl, sued defendants, who are alleged to be inmate and kraalhead respectively, in the Native Commissioner's Court, Idutywa. According to the summons and the further particulars furnished, defendants reside in Willowvale District, the seduction and intercourse resulting in pregnancy took place in Idutywa village and the particulars of claim contain the following allegation:—

> "That the said wrongful and unlawful acts of the defendant were all committed in the District of Idutywa and therefore within the jurisdiction of this Honourable Court."

An objection by defendants to the jurisdiction of the court on the ground that the whole cause of action as against both defendants did not arise within the District of Idutywa was dismissed by the Assistant Native Commissioner. Second defendant now appeals from this order on the following grounds:—

> "That the said judgment is bad in Law in so far as the second defendant (now appellant) is concerned in that:—
>
> (i) By the general principles of Common Law and Native Custom alike the plaintiff must seek the defendant, which right of defendant can only be taken away by direct legislation and not by implication.
>
> (ii) The course of action against No. 2 defendant arises from the latter's kraal head responsibility under Native Custom which, in turn implies that No. 1 Defendant was actually resident with and within the orbit of control of No. 2 Defendant at the time of the alleged tort.
>
> (iii) Even if the conclusions of Law under (ii) supra be incorrect it still remains that the cause of action (as distinct from the reasons for institution proceedings against No. 2 Defendant arises solely from the latter's kraal head, responsibility under Native Custom, which is a matter arising without the area of jurisdiction of this Court.

At Common Law a defendant has the right to be tried by the court or courts having jurisdiction in the area in which he resides. He can, of course, waive this right by submitting to the jurisdiction of another court, but unless he so submits a judgment against him by such court would be void *ab initio*. Various statutes creating courts of law have, however, widened the jurisdiction of such courts by enacting that the court shall have jurisdiction if the cause of action arose wholly within its district. These are the words used in section *twenty-eight* (1) (*d*) of Proclamation No. 145 of 1923, but as was pointed out in Zanazo *v.* Mqandana [1937 N.A.C. (C & O) 216], this section was superseded by section *ten* (3) of Act No. 38 of 1927, as amended, which provides that a Native Commissioner's Court for an area shall have no jurisdiction to try a case unless, *inter alia* "the cause of action in that case arose in that area". It will be noticed that the word "wholly" is omitted but that makes no difference, because a defendant's common law rights cannot be taken away by statute unless the legislature has expressed its intention of doing so in clear language. If it were the intention to confer jurisdiction on a court if the cause of action arose *partly* within its area the legislature would have said so. The words "arose in that area" in section *ten* (3) of the Act must therefore be interpreted as meaning "arose wholly in that area".

The phrase "the cause of action arising in an area" was defined in Cook *v.* Gill (L.R. 8 C.P. 107), as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved". This

definition was adopted with approval in McKenzie *v.* Farmers' Co-operative Meat Industries, Ltd. (1922 A.D. 16), and has been consistently followed since.

In the present case the facts which plaintiff has to prove in order to succeed are: (i) that the parties are Natives, (ii) that plaintiff is the father of his unmarried daughter Gladys, (iii) that first defendant had intercourse with and caused the pregnancy of Gladys within the area of jurisdiction of the Native Commissioner's Court of Idutywa, and (iv) that first defendant is an inmate of the kraal of second defendant. It is not necessary in order to obtain judgment, to prove that that kraal is in Willowvale District and that first defendant occupies a particular hut at that kraal. These are "pieces of evidence" to prove the fact that first defendant resides at a kraal of which second defendant is the head.

In Feld and East London Cinema (Pty.), Ltd. *v.* Mavjee (1944 C.P.D. 520), Feld was engaged at Johannesburg by the Company, which had its head office there, to manage its cinema at East London. Mavjee, alleging that the whole cause of action arose within the jurisdiction of the East London Magistrate's Court, sued Feld and the Company for damages for breach of contract and for damages for *injuria* committed by Feld in the course of his employment. The company objected to the jurisdiction of the Magistrate's Court. The Magistrate overruled the objection. In dismissing an appeal against this judgment *Fagen* (*J*) said "the authority of the manager relied on is ostensible authority and not the actual terms of his appointment and it is also clear from the summons that all facts which are relied on as proving that ostensible authority are facts which occurred at East London in the Magistrate's jurisdiction". Just as in that case it was unnecessary to prove, in order to obtain judgment, that the manager was engaged in Johannesburg, so in the present case it is unnecessary to prove that the kraal of which first defendant is an inmate and of which second defendant is the head is in any particular district.

The appeal is dismissed with costs.

Per Blakeway (Member): I concur.

Per Elston (Member): I concur.

For appellant: Mr. Wigley, Willowvale.

For respondent: Mr. Mahoud, Butterworth.

CASE No. 114.

MACOPA *v.* NOTAYI.

PORT ST. JOHNS: 28th September, 1950. Before J. W. Sleigh, Esq. (President), Messrs. D. S. Grant and H. O. Wilbraham, Members of the Court (Southern Division).

Absolution from the instance—Onus on defendant—Facts found proved and reasons for judgment—Record of evidence.

A judgment of absolution from the instance is not competent where the burden of proof is on the defendant.

Plaintiff *nqomaed* a filly to defendant and one Godi purported to sell a stallion, progeny of the filly and belonging to plaintiff, to defendant. Plaintiff brought a vindicatory action against defendant who admitted plaintiff's ownership but claimed that the filly had been given to him as his *nqoma* share and that Godi had authority to sell the stallion. He failed to prove these allegations but judgment of absolution was entered.

Held: That judgment should be altered to one for plaintiff.

Sebogo *v.* Raath, 1947 (2) S.A.L.R., p. 628 (T.P.D.), followed.

The rule that the judicial officer shall state the facts he found to be proved and his reasons for judgment and the manner of recording the evidence discussed.

Appeal from the Court of the Native Commissioner, Bizana.

Per Grant (Member) (delivering the judgment of the Court):—

In an action by plaintiff (now appellant) for five horses which he describes as a yellow mare, a chestnut stallion, a yellow filly and two other increase. Defendant pleads in effect that he received a *nqoma* from Mamadiya and Godi (the mother and half-brother respectively of appellant), of a mare; that of the progeny of this animal he was given as his share a mare, which had three increase. He pleads that he bought the fifth horse from Godi.

The Acting Assistant Native Commissioner absolved defendant in respect of a dark bay mare and a chestnut stallion (wrongly described in the judgment as a black stallion), this latter being the horse sold to him by Godi, and entered judgment for defendant for the other three horses claimed. Appellant has noted an appeal against the absolution judgment only.

As this is a vindicatory action the onus was on appellant to prove ownership. If he could discharge this onus the defendant would then be obliged to prove that the appellant did give him the mare as his *nqoma* share, that he did buy the chestnut stallion from Godi and that the latter had authority to sell it.

It appears from the evidence of appellant and his witnesses that a filly was amongst the dowry received by appellant for the daughter of the late Topi. This filly was *nqomaed* to respondent by Mamadiya. After it had had a filly at respondent's kraal, Mamadiya removed both animals and later *nqomaed* its progeny (the filly) to respondent. Appellant confirmed the *nqoma* after his return to the district. He and Mamadiya removed several of the progeny from time to time. Godi, at one stage, claimed to be the owner of the horses and sold a chestnut stallion to respondent during appellant's absence.

The Native Commissioner does not say in his reasons whether or not he was satisfied that appellant had discharged the onus that was upon him and he justified his judgment by saying he was not satisfied that appellant was Topi's heir and therefore the owner of the horses. Appellant states that he is the heir. He admits that Godi is older than himself but says that the latter is illegitimate. This is confirmed by Godi and, although the fact that he at one time claimed to be the heir can be used to discredit him, it cannot be taken as evidence against appellant. There is not a tittle of evidence to contradict appellant's evidence on this point; indeed, the respondent in his plea says he has no knowledge on this point. On the evidence therefore, there can be no doubt that appellant is the heir of Topi and as he actually received delivery of the dowry of Topi's daughter it follows that he was the owner of the original filly.

The onus at this stage shifted to respondent to justify his retention of the horses which he admits are the progeny of the original filly. As he has produced no evidence that Godi had authority to sell the chestnut stallion, he has failed to discharge his onus in so far as this animal is concerned; similarly he has failed to prove that appellant did pay him the mare as his *nqoma* share. In these circumstances a judgment of absolution is not competent [see Sebogo *v.* Raath, 1947 (2) S.A.L.R.] at p. 628, and the Native Commissioner has overlooked the fact that the effect was to put plaintiff to the expense of bringing a fresh action which might end in the same result if respondent again failed to discharge his onus.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to read: "For plaintiff for the chestnut stallion and the dark brown mare or their value at £15 each, and for defendant for the other three horses claimed. Defendant is ordered to pay the costs".

The attention of the judicial officer is drawn to the fact that the rules require him to furnish a statement of the facts he has found to be proved and of his reasons for his judgment. In this case he has failed to set out any facts found proved except those which are common cause. His reasons for judgment are of

little assistance to this Court because he has not, as he should have, detailed his reasons for his findings of fact [see Mcunu *v.* Gumede, 1938 N.A.C. (T. & N.), p. 6; Sayimani *v.* Sigabo & Ano., 1941 N.A.C. (C. & O.), p. 94 and Mditshwa & Ano. *v.* Mkwetana, 1942 N.A.C. (C. & O.) 87].

The manner in which the evidence has been recorded leaves much to be desired. The practice of omitting words from sentences to reduce their length makes it difficult for anyone, who has not heard the evidence, to follow the record [see Tshemese *v.* Tshemese, 1941 N.A.C. (C. & O.) 104 and Fokwana *v.* Sityila, 1942 N.A.C. (C. & O.) 17]. In cases where a number of animals is involved, some of which are of similar description, it will be of great assistance to anyone reading the record if the animals are initially described and numbered and thereafter referred to by their respective numbers. In this case it is difficult if not impossible, to connect up the various horses.

Finally his attention is directed to the fact that he omitted to make any award of costs in his judgment.

For appellant: Mr. C. Stanford, Lusikisiki.

For respondent: Mr. H. H. Birkett, Port St. Johns.

CASE No. 115.

NONKONYANA *v.* **SINYI.**

PORT ST. JOHNS: 28th September, 1950. Before J. W. Sleigh, Esq. (President), Messrs. D. S. Grant and H. O. Wilbraham, Members of the Court (Southern Division).

Interpleader—Cause of action in original suit based on nqoma—*Not* res judicata.

For a plea of *res judicata* to be successful it is essential *inter alia* that the cause of action and the parties in both cases be the same. The contract of *nqoma* gives rise to a cause of action different from that in an interpleader action.

Appellant obtained judgment of four head of cattle against Sinyi in an action based on the contract of *nqoma* in which respondent who was not joined as a party, gave evidence that he (respondent) owned the cattle. On the cattle being attached respondent interpleaded against appellant claiming ownership and appellant's plea that the matter was *res judicata* was overruled by the Native Commissioner. Appellant then appealed.

Held: That the appeal be dismissed.

Appeal from the Court of the Native Commissioner, Flagstaff.

Per Sleigh (President) (delivering the judgment of the Court):—

In case No. 77 of 1949 (Flagstaff), appellant sued Katana Sinyi, the son of respondent for delivery of certain four cattle or payment of their value, £32. In the summons it was alleged that he, appellant, had *nqomaed* a certain heifer to Katana and that this heifer had increased to the four cattle claimed. In the plea to this claim Katana denied that the heifer had been *nqomaed* or that he had ever "owned" (possessed) cattle in his life. Judgment was, however, given for plaintiff for "Four head of cattle" and the heifer and its three increase were attached at the kraal of Katana's brother, in whose name they were registered at the dipping tank.

Respondent now, in an interpleader action, claims the cattle as his property. To this claim appellant pleads specially as follows:—

> "Defendant pleads to the above claim that the cattle now claimed by plaintiff are the actual cattle for which defendant obtained judgment against one Katana Sinyi, the judgment debtor in case No. 77 of 1949, Flagstaff, whereout this action arises. The above-named plaintiff Kaya Sinyi gave evidence alleging the said cattle were his property, but the

Court found that they were the property of the above-named defendant, Sigidlimana. Defendant consequently pleads that plaintiff is now estopped from alleging that the said cattle are his and furthermore the said judgment was a judgment *in rem* and consequently binding on plaintiff."

The Native Commissioner overruled this plea and appellant appeals on the following ground:—

"1. That the Native Commissioner having found, as he did in Flagstaff case No. 77 of 1949, Sigidlimana Nonkonyana *v.* Katana Sinyi, that the cattle in question belonged to the appellant (defendant), thereby deciding their status and ownership, the judgment in that case was a judgment *in rem* and the Native Commissioner erred in holding that it was not, consequently his judgment was wrong and bad in law.

2. That accordingly the plea was a good one and should have been upheld."

For a plea of estoppel by record, or *res judicata* (as it is usually called), to be successful, it is essential that the cause of action in both cases be the same. In determining whether the issue in the previous case is the same as that in the present case, the Court must look to the pleadings and not to the evidence (Bantu Reformed Apostolic Church *v.* Ninow and Michael, 1947 (1) S.A.L.R. 187]. Now, the issue raised in the pleadings in case No. 77 is not the same as that raised in the interpleader action. In the latter the Court had to decide whether or not the cattle were the property of the claimant (respondent on appeal). In the previous case the Court had to decide whether or not the original heifer was *nqomaed* to Katana.

It is not alleged in the particulars of claim in Case No. 77 that the heifer was the property of appellant. Although it is not usual for a person to *nqoma* the property of another, it is competent to do so. In the previous case the Court found that appellant had *nqomaed* the heifer to Katana and under the contract of *nqoma* the latter was bound to return it and its increase to appellant. It did not decide that appellant was the owner of the stock.

Apart from this, respondent was not a party to the previous case. But it is contended that the judgment in the previous case was a judgment *in rem* and therefore binding for or against strangers. We do not accept the contention that the judgment was a judgment *in rem*. Such a contention might hold good if the Court had decided upon the status of the cattle, which it did not.

The appeal is consequently dismissed with costs.

For appellant: Mr. C. Stanford, Lusikisiki.

Respondent in default.

CASE No. 116.

ZITULELE *v.* MANGQUZA.

PORT ST. JOHNS: 28th September, 1950. Before J. W. Sleigh, Esq. (President), Messrs. D. S. Grant and H. O. Wilbraham, Members of the Court (Southern Division).

Delict—Native causing death of another Native—Widow of customary union can sue—Male partner under legal obligation to support his customary wife—No duty on deceased's father to support widow. Facts upon which pecuniary loss suffered can be calculated.

The male partner to a customary union is under a legal obligation to support his wife in that union and there is no such obligation on the deceased husband's father.

Where there is sufficient evidence on record to enable the court to arrive at an equitable assessment of the loss suffered by the widow it must, however scanty such evidence may be calculated and assess the amount of such loss.

Mangquza married respondent according to Native custom. A, unlawfully killed Mangquza and respondent sued for damages for loss of support, maintenance and assistance for herself and two minor children. The Assistant Native Commissioner awarded respondent £50 and costs. The defendant appealed.

Held: That the appeal be dismissed.

Ngqongqonzi and Ano. *v.* Nyalambisa and Others [4 N.A.C. 32 and Mcanywa *v.* Volovane and Others 1943 N.A.C. (C. & O.) 26] followed.

Mokwena *v.* Laub [1943 (2) P.H.K. 64] distinguished.

Appeal from the Court of the Native Commissioner, Flagstaff.

Per Sleigh (President) (delivering the judgment of the Court):—

It is common cause that the late Mangquzu married plaintiff (now respondent) according to Native custom. Before he married her he was married, according to Native custom, to another woman who died. He left two children, one by his first wife, and one by respondent. On 10th December, 1948, defendant (now appellant) unlawfully shot and killed Mangquza.

In an action against appellant for payment of the sum of £150 or alternative relief, the following allegations appear in the particulars of claim:—

> "By reason of the said unlawful killing of her husband plaintiff claims that she is entitled to compensation for loss of support, maintenance and assistance for herself and two minor children of tender years whom she has to bring up and has sustained damages in the sum of £150 including £3. 10s. funeral expenses."

In his plea, in so far as it is relevant to the appeal, appellant denied that respondent was entitled to any compensation either for herself or for the two children and puts respondent to the proof of her claim.

The Assistant Native Commissioner awarded respondent the sum of £50 and costs. From this judgment the appellant appeals.

One of the grounds of appeal is that, because of respondent's marriage to her husband according to Native custom, he "was under no duty to support her" and consequently she has no cause of action against appellant. This is an exception which should have been taken as is provided for in the rules, but as there is no objection he will consider this ground.

We cannot agree with this contention. All the authorities we have been able to find are against it. This action is, of course, brought under the common law. The question whether a woman married according to Native custom can recover damages from another Native who has wrongfully caused the death of her husband depends on whether the male partner to a customary union is under a legal obligation to support his customary wife. There can be no doubt that he is under such obligation. Refusal without good cause to support his wife while she is living at his kraal amounts to a repudiation of the union and her "dowry holder" is entitled to dissolve the union; or the male partner could be prosecuted under the Deserted Wives and Children's Act of 1895 [see sub-section 4 of section *ten* (*bis*) of Act No. 38 of 1927, as amended]. Moreover, it was held in Ngqongqozi and Ano *v.* Nyalambisa and Others, 4 N.A.C. 32) that a widow of a customary union could recover damages under common law from another Native who had caused the death of her husband [see also Kanyilo *v.* Mbeje, 1939 N.A.C. (T. & N.) 25].

In Mokwena *v.* Laub [1943 (2) P.H. K. 64] the plaintiff, a widow, who was married to her husband according to Native custom, sued defendant, a European, for damages suffered as a result of the death of her husband, the death having been caused by the negligent act of defendant's Native servant. She claimed

(*a*) £645 for herself and (*b*) £265 in her capacity as guardian of her minor children. The Witwatersrand Local Division, allowing an exception to the summons that it disclosed no cause of action, held that her marriage could not be regarded as a legal union and that defendant, a European, was not bound by a legality which arose under Native law and custom. (In this connection see also Msindo *v.* Moriarty, 16 S.C. 539). In Laub's case the Court seemed to infer that if the plaintiff had sued Laub's Native driver of the vehicle the summons would have disclosed a cause of action, but in that case she would not have been entitled to represent her minor children because under Native law she was not their legal guardian. She could, however, represent her children in an action against Laub if her union were illegal and her children illegitimate, because under common law, to which Laub was subject, she was their guardian. Where defendant is a Native the difficulty could be overcome by joining the legal guardian under Native law as a co-plaintiff, but the position when the defendant is a non-Native is entirely unsatisfactory and cries out for legislative action. However, Laub's case is no authority for the proposition that the widow of a customary union cannot maintain an action against another Native who has unlawfully caused the death of her husband.

The next ground of appeal which comes up for decision is whether there is any legal obligation upon the father of the deceased (respondent's father-in-law), to support her. Obviously there is none. In Native law a widow is entitled to be supported out of her deceased husband's estate and she can enforce this right by legal action against her husband's heir or the latter's guardian, if the heir is a minor; but such guardian is under no obligation to support the widow out of his own means. Even if there were such an obligation, we are here concerned with compensation for loss of support which respondent could have expected from her husband, had he been alive, in addition to any support afforded by her father-in-law. The fact that the deceased used to send his earnings to his father to administer does not mean that respondent derived no benefit therefrom, because the money remitted would have been used for the support of the whole family.

The next question is whether respondent has placed before the trial court evidence of facts upon which the pecuniary loss suffered by appellant could be calculated. In Mcanywa *v.* Volovane and Others [1943 N.A.C. (C. & O) 26] the nature of the evidence required to prove calculable pecuniary loss was considered. The Court held (at p. 29) that if there is sufficient evidence on record to enable the court to arrive at an equitable assessment of the loss suffered by the widow, it must, however scanty such evidence may be, calculate and assess the amount of such loss.

Now, there is uncontradicted evidence that the deceased worked in Natal once and on the Rand mines twice before he married his first wife, once after he married her and once after he married respondent, and that on this occasion he was away at least 10 months and that his wages were £3 per month. There is further evidence that between periods of employment he stayed at home from two to three years. There is no evidence that he was engaged on remunerative employment while at home. Taking three years at his interval of rest, there is this evidence that on the average he worked nine months during each cycle of 45 months earning £3 per month. According to the evidence he was strong and healthy and was 36 years of age at the time of his death, and that respondent was 30 years of age and her child an infant. There is thus sufficient evidence upon which a reasonably accurate estimate of her loss can be made.

The last ground of appeal is that the amount awarded is excessive. The Assistant Native Commissioner has estimated that the deceased could have continued in remunerative employment for a further 12 years working 6 months a year at £3 per month earning in all £216, and has given respondent £50 of this amount

as compensation for herself and her own child. In our opinion the Assistant Native Commissioner should have allowed the deceased 16 years of remunerative employment. During this period, working one month out of five, he would have earned £115. His earnings would probably have been more, because with the increase of his responsibility he would have engaged in employment more often, and his average monthly wages would have increased with higher efficiency. If out of the £50 awarded by the Assistant Native Commissioner the child were allowed £3 per annum for 15 years, the balance available for respondent herself would be £5. This amount is not excessive even if she remarries after the child is weaned.

In all the circumstances no good ground has been shown for disturbing the judgment of the Court below. The appeal is dismissed with costs.

For appellant: Mr. H. H. Birkett, Port St. Johns.

For respondent: Mr. C. Stanford, Lusikisiki.

CASE No. 117.

MANJEZI *v.* **SIRUNU.**

PORT ST. JOHNS: 28th September, 1950. Before J. W. Sleigh, Esq. (President), Messrs. D. S. Grant and H. O. Wilbraham, Members of the Court (Southern Division).

Deduction from dowry on refund—On what account—Pondo custom.

Where a child has been born and, the mother having deserted, one beast is deducted from the dowry on return and it is not stated on what account the deduction is made then it is presumed that it is for the child even though custom allows the deduction of more than one beast.

Appellant (defendant in the Court below) took respondent's daughter Nomapukutshe to his kraal and when sued pleaded that as heir to Sukabezebezela who was heir to Manjezi who was the father of respondent's wife and her dowry eater he was entitled to the girl Nomapukutshe. On dissolution of the customary union when by Pondo custom three beasts might have been deducted, the dowry less one beast had been returned as a result of a case against Sukabezebezela. In that case it was not specifically stated either in the claim or in the judgment for what purpose the single deduction was made. Appellant claimed that this beast was deducted for the services of the wife, that no beast had been deducted for the child and that therefore he was entitled to be declared her guardian. The Assistant Native Commissioner gave judgment for plaintiff, her father, declaring him to be her guardian. Defendant appealed.

Held: That in the absence of conclusive evidence the Court would not hold that the father intended to repudiate his child and that the appeal should therefore be dismissed.

Appeal from the Court of the Native Commissioner, Port St. Johns.

Per Sleigh (President) (delivering the judgment of the Court):—

The facts in this case are not in dispute. They are as follows: Many years ago plaintiff (now respondent) entered into a customary union with Mamsutwana, the sister of appellant, and paid the equivalent of ten head of cattle as dowry to her father, the late Manjezi. There was one child of the union namely, a girl Nomapukutshe. After the death of Manjezi, Mamsutwana, who was a daughter in his right-hand house, deserted respondent who thereupon claimed and obtained a default judgment (Case No. 76/40) against Sukabezebezela, the son and heir in Manjezi's right-hand house, for the return of his wife or payment of the equivalent of nine head of cattle. The judgment was satisfied by the attachment of stock.

It appears from the papers before us that Sukabezebezela has died and that appellant is his heir. About the beginning of February, 1950, when Nomapukutshe was sent to Port St. Johns to do shopping appellant contacted her, took her to his kraal and refused to release her.

Respondent now claims a declaration of rights in respect of the girl. The defence is that respondent is estopped from claiming the girl because the customary deduction of a beast in respect of her was not made when the restoration of the dowry was claimed in the 1940 case. It was contended that the beast which was deducted was for the "services" of Mamsutwana and that another beast should have been deducted for the wedding outfit. Appellant's attorney applied for leave to call evidence to prove that a wedding outfit had been supplied. This was refused and the Assistant Native Commissioner declared respondent to be the guardian of Nomapukutshe. From this judgment appellant appeals.

At the hearing of the appeal, appellant, who was not legally represented, stated that he was not claiming any right to the child, but maintained that two further cattle should have been deducted at the time of the dissolution of the union. But this was not the case the Native Commissioner had to decide, and appellant must confine himself to the notice of appeal.

One of the grounds of appeal is that the Native Commissioner erred in refusing to hear evidence to establish that a wedding outfit had been supplied. This ground is untenable. On the pleadings the question for decision was whether the deduction of one beast was for the "services" of Mamsutwana or in respect of her child. The question whether or not a wedding outfit had been supplied is therefore quite irrelevant.

Assuming, however, that a wedding outfit had been supplied, then, according to Pondo custom, three head of cattle should have been deducted when judgment was given in the 1940 case, namely, one for the services of the wife, one for the wedding outfit and one for the birth of the child [Mkanzi *v.* Masoka, 1 N.A.C. (S) 145]. In the 1940 case only one beast was deducted. Neither in the claim nor in the judgment is it specifically stated for what purpose the deduction was made, but it is clear from the particulars of claim that respondent intended the deduction to apply to the birth of the child, otherwise the allegation in the summons "that there is one child of the marriage" would have been redundant. It is also clear that Sukabezebezela understood this to be the position, otherwise he would have claimed the child at the time of the dissolution of the union.

Even if the summons had been entirely silent on the point and even if the child had remained with Sukabezebezela this Court would not, in the absence of conclusive evidence, have held that respondent intended to repudiate his child, especially as the custom of deducting a beast for each child born is observed by all tribes in the Cape Province, whereas the deduction of a beast for the "services" of the wife is peculiar to Pondo custom.

The appeal is dismissed with costs.

For appellant: In person.

For respondent: Mr. Birkett, Port St. Johns.

CASE No. 118.

MTOLO *v.* **POSWA.**

KOKSTAD: 11th October, 1950. Before J. W. Sleigh, Esq. (President), Messrs. J. O. Cornell and W. H. Wakeford, Members of the Court (Southern Division).

Section eleven (1) *of Act No.* 38 *of* 1927—*Action for damages for defamation—Judicial officer has no discretion.*

If a matter is actionable only at Native Law or only at Common Law the judicial officer has no discretion. He must apply the law which affords the remedy. When, however, the matter is actionable under both systems of law then the judicial officer has a discretion. This is the general and ultimate effect of section *eleven* (1) of Act No. 38 of 1927.

Plaintiff in the Court below sued defendant for damages for defamation, alleging that defendant had published certain defamatory words (not constituting an allegation of witchcraft) concerning her. The Assistant Native Commissioner ruled that the case must be tried according to Native Law and Custom and entered judgment for defendant.

In an appeal, *held* that the Native Commissioner had no discretion to apply Native Law, that the appeal be allowed and the record of proceedings be returned to the trial Court for further hearing and a fresh judgment *ex parte* Minister of Native Affairs in *re* Yako *v.* Beyi [1948 (1) S.A.L.R., at pp. 399/400] discussed.

Per Sleigh (President) (delivering the judgment of the Court):—

Appellant who was the plaintiff in the Court below sued respondent for £25 damages for defamation. It is alleged that respondent addressing appellant in the presence of Ciliza uttered the following false, malicious and defamatory words in the Native language concerning appellant, viz. *Angikhulumi nomfazi mina isikaundan* which words in English mean "I do not talk with a woman, a prostitute". Respondent averred in his plea that the words are not defamatory.

At the close of appellant's case respondent's attorney applied for judgment of absolution on the ground *inter alia* that, except for imputation of witchcraft, no action for damages for defamation lies under Native Law and Custom. The Assistant Native Commissioner then ruled that the case must be tried according to Native Law and Custom, upheld the attorney's contention and entered a judgment for respondent with costs.

From this judgment appellant appeals. One of the grounds of appeal is that common law should have been applied to the issue.

It is correct that under Native Law no action lies for defamation of character unless the plaintiff is accused of practising witchcraft. But was the Assistant Native Commissioner correct in trying the case according to Native Law? He has a judicial discretion in terms of section *eleven* (1) of Act No. 38 of 1927 to apply Native Law in a case in which a question of custom followed by Natives is involved. The discretion is his and, as was pointed out in Lebona *v.* Ramokone [1946 N.A.C. (C. & O.) 14], if he exercises the discretion judicially and for substantial reasons, this Court will not interfere with his discretion.

The Assistant Native Commissioner's reason for ruling that the case must be tried under Native Law is that appellant "is married according to Native Custom, and is still attached to the tribal way of life (she first brought her action before the headman of the location)". These seem to me to be insufficient grounds for depriving appellant of a right which she has under Common Law. In Native Law no action lies for damages for assault. A complainant must sue under Common Law. To refuse her the right to recover compensation for physical injuries, which may be of a serious nature, merely because she is married according to Native Custom and is attached to the tribal way of life, would be most unjust.

If a matter is actionable only under Native Law or only at Common Law, then in my opinion, the judicial officer has no discretion. He must apply the law which affords the remedy [see Magidela *v.* Sawintshi, 1943 N.A.C. (C. & O.) 52]. When, however, the matter is actionable under both systems of law as in Beyi's case (*infra*) then the judicial officer has a discretion. This seems to me to be the general and ultimate effect of section *eleven.*

In *ex parte* Minister of Native Offairs in *re* Yako *v.* Beyi [1948 (1) S.A.L.R., at pp. 399/400] Schreiner J. A. said "Generally, no doubt, if a remedy exists under one of the two systems (of law), but not under the other, this would be a reason for applying the former, since the existence of a remedy . . . itself provides some ground for believing that its general application would probably be in the interests of justice. But in some cases it may seem to be preferable to give effect to a defence that the defendant has under the one system and not under the other". It is difficult to conceive of a case in which an exception that the summons disclosed no cause of action under Native Law could be successfully pleaded to an action based on delict and actionable under Common Law *only*. Be that as it may, the general principle is that the Native Commissioner has the choice of applying the one or the other system of law only when the wrong complained of is actionable under both systems of law; otherwise the law which provides the remedy should be applied.

Now, in the present case appellant has no remedy under Native Law. Presumably Natives had their own way of squaring insults without recourse to courts of law, but such methods cannot be countenanced in a civilized community. There is a long series of cases in which it has been held that because Native Law does not provide a remedy, actions for defamation must be brought under Common Law. Appellant has done so and defendant must answer her claim under Common Law. It would have been different if she had elected to sue under Native Law as in Mbambo *v.* Swaai [1931 N.A.C. (C. & O.) 19], because if she invoked the aid of a law which denies her a right of redress she cannot complain if respondent resists her claim under that law. In our opinion this case must be determined according to the system of law which affords the remedy, that is Roman-Dutch Law, and the Assistant Native Commissioner erred in ruling that it must be tried under Native Law.

The appeal is allowed with costs, the judgment of the Court below is set aside and the record of proceedings is returned to the trial court for further hearing and a fresh judgment.

For appellant: Mr. Elliot, Kokstad.

For respondent: Mr. Eagle, Kokstad.

CASE No. 119.

MBINDA *v.* MBINDA.

UMTATA: 18th October, 1950. Before J. W. Sleigh, Esq. (President), Messrs. J. A. Kelly and R. A. Bowen, Members of the Court (Southern Division).

Dowry for wife in right-hand house paid by great house—Method of recovery—Great House not required first to excuss dowry of eldest daughter of right-hand house.

An obligation to refund is created when a junior house is founded with a dowry paid by a senior house. When and how such obligation shall be discharged is at the option of the senior house and is only subject to the rule that repayment must be claimed out of the dowries of the daughters of the junior wife.

There were three daughters in a certain right-hand house that had been established with a dowry from the great house. All three married, dowries being paid to the right-hand house. The heir in the great house sued the heir in the right-hand house for a refund of the dowry, alleging in his summons that the two younger daughters had married. The Assistant Native Commissioner dismissed the claim, holding that the dowry for the eldest daughter should have been excussed first.

Held: That the senior house need not excuss the dowry of the eldest daughter of the junior house before reclaiming the dowry from the dowries of younger daughters.

Appeal accordingly allowed.

Appeal from the Court of the Native Commissioner, Cala.

Per Sleigh (President) (delivering the judgment of the Court):—

Appellant and respondent are respectively the heirs in the great house and the right-hand house of their late father Ntoyapi Mbinda. Appellant, who was the plaintiff in the Court below, claims from respondent—

(1) delivery of certain eight cattle, being a red cow, which, it is alleged, was given to him by his father, and its progeny or payment of their value, £80; and

(2) Payment of elven head of cattle or their value, £88, being a refund according to custom, of the dowry paid out of the great house property for respondent's mother.

It is alleged that respondent has received dowry for two of his sisters.

In his plea respondent denies the gift alleged in the first claim and avers that the second claim is not well founded in law. The Assistant Native Commissioner dismissed the second claim at the close of appellant's case and, after hearing respondent's evidence on the first claim, entered judgment for respondent on this claim. The appeal is against both judgments.

No good grounds have been advanced for upsetting the decision of the Assistant Native Commisioner on the first claim and the appeal fails.

In regard to the second claim, it is common cause that there were three daughters in Ntoyapi's right-hand house, namely, Nontula, Notena and Mxoxozi. Of these Nontula is the eldest. Notena was the first to be married and thirteen head of cattle were paid as dowry for her. It is not clear who married next but the evidence goes to show that two or four cattle were received for Nontula and seven for Mxoxozi and that the dowries for all the daughters were paid to Ntoyapi during his lifetime.

The Assistant Native Commissioner's reason for dismissing this claim is that "the lobola received for the eldest daughter, Nontulo, should have been excussed before claiming on lobolo received in respect of subsequent daughters." He states that in coming to this conclusion he was guided by the principles set out on pages 535 and 536 of the second edition of Whitfield's South African Native Law. These principles make it clear that cattle taken from a senior house to found a junior house creates a liability on the latter house which must be discharged upon the marriage of the daughter of such house. Whitfield says that the refund is made out of the lobolo of the eldest daughter of the minor house. This has led to a great deal of confusion. It is sometimes contended that the eldest daughter of a junior house actually belongs to the senior house [see, e.g. Notshila *v.* Notshila, 1 N.A.C. (S) 12] and if she dies before marriage or never marries the claim of the senior house lapses. It is clear, however, as was pointed out in Sikwikwikwi *v.* Ntwakumba [1 N.A.C. (S) 23], that the senior house is entitled to repayment of the debt in full out of, and has a preferant claim to, any fines and dowries received for the daughters of the junior house. Usually refund is made out of the lobolo of the first daughter to be married and such daughter is usually the eldest, because it is well known that Natives are reluctant to give a younger daughter in marriage before the eldest, hence the misleading statement that refund is made out of the dowry of the eldest daughter. If the father of the girl is still alive he should earmark the dowry cattle or some of them with the mark of the senior house and when this is done the debt is extinguished, but where the father has failed to do this or if the dowry of the first daughter to be married is required to found a *qadi* house or to lobola a wife for the brother of such daughter, the senior house does not forfeit its claim for repayment out of the dowries of other daughters of the junior house. The senior house is entitled to claim the dowry, it is not compelled to do so. Acting through the kraal head of the senior house it may defer its claim to the dowry of the first daughter to enable the junior house to establish itself.

In such circumstances it would be most unjust to hold that it has forfeited its rights. It must not be overlooked that an obligation to refund is created when the junior house is founded. When and how such obligation shall be discharged is at the option of the senior house and is only subject to the rule that repayment must be claimed out of the dowries of the daughters of the junior wife.

In the present case appellant is claiming a refund of the dowry paid for respondent's mother. He is entitled to such refund out of the dowries of the daughters of the right-hand house. The Assistant Native Commissioner, therefore, erred in holding that he had first to excuss the dowry of the eldest daughter, Nontula, before he had any right to be reimbused out of the dowries of the other daughters.

The appeal consequently succeeds and is allowed with costs. The judgment of the court below in respect of the second claim is set aside and the record of proceedings is returned for such further evidence as the parties may wish to adduce and for a fresh judgment.

For appellant: Mr. Muggleston, Umtata.

For respondent: Mr. Hughes, Umtata.

CASE No. 120.

MPENGULA *v.* MNHASE.

UMTATA: 18th October, 1950. Before J. W. Sleigh, Esq. (President), Messrs. J. A. Kelly and R. A. Bowen, Members of the Court (Southern Division).

Dowry—Claim against holder by rightful guardian—Failure to exert right timeously—Deductions for ntjonane *ceremony and wedding expenses*—Bona fide *dowry holder liable to account for but need not replace* (vusa) *cattle.*

Matazana's father, being a leper, asked defendant's mother to fetch the child, which she did. Matazana grew up at defendant's kraal where she went through the *ntonjane* ceremony and from which she was married. Although defendant knew of the existence of plaintiff and his family it was possible that he thought his mother had adopted the child. Plaintiff and his people took no interest in the child for 30 years. Plaintiff now claimed the seven head of cattle given as dowry for Matazana plus seven increase. Defendant denied the claim but pleaded in the alternative that all but five of the cattle had died and of these he was entitled to retain three head, one as *isondlo* and one each for the *ntonjane* and wedding expenses. The Assistant Native Commissioner's finding that defendant had dealt *mala fide* with the dowry cattle gave judgment for the seven original cattle and seven increase, less one beast as *isondlo*. Defendant appealed.

Held: (1) That the Assistant Native Commissioner's finding that the defendant knew he had no right to the girl's dowry was not supported by the evidence, that plaintiff's failure to exert his right timeously contributed to defendants belief that he (defendant) was entitled to the dowry; and that therefore on the evidence, defendant acted *bona fide*.

Held: (2) That, nevertheless, he was not entitled as of right to make deductions for the expenses incurred in connection with the girls *ntonjane* and marriage.

Held: (3) That defendant was not an agent and although he had to account in full for the dowry, was under no obligation to report deaths or on failure to report to replace (*vusa*) cattle which had died, and that on the evidence he had accounted.

Held: (4) That the judgment of the court below should be altered to one for plaintiff for six head of cattle or their value, £54, and costs.

Wana *v.* Zokozoko and Ano., 5 N.A.C. 94, and Ngubentombi *v.* Mnene, 4 N.A.C. 49, followed.

Per Sleigh (President) (delivering the judgment of the Court):—

In the particulars of claim it is alleged that plaintiff is the guardian of a girl, Matazana, that defendant gave her in marriage about the year 1929 and received as dowry certain seven head of cattle which are described, and that these cattle have increased by seven head. He claims the fourteen cattle or their value at £10 each.

The defence to the claim is that the girl, who was abandoned by her people, was adopted by defendant's mother with the approval and at the instance of the Magistrate, Tsolo. Defendant avers that the cattle have decreased to five head. In an alternative plea he pleads that if plaintiff is entitled to the girl's dowry he (defendant) is entitled to retain three of the five cattle, namely, one as *isondlo* and one each for *ntonjane* and wedding expenses. He denies that the cattle are worth £10 each.

The Assistant Native Commissioner found on the evidence that the dowry cattle had at least thirteen increase. He held that as defendant knew that plaintiff was entitled to the girl's dowry and had given her in marriage without plaintiff's knowledge, consent or approval, his (defendant's) dealings with the cattle were *mala fide* and that he must therefore account to plaintiff for the dowry and the increase in full and was not entitled to make deductions in respect of the wedding outfit and the *ntonjane* ceremony. Consequently, judgment was entered for plaintiff for thirteen cattle, that is, for the seven original cattle and seven increase as claimed in the summons less one beast as *isondlo*. The alternative value of the cattle was fixed at £9 each.

Defendant now appeals against that portion of the judgment in excess of four head of cattle or their value, £36. The grounds of appeal are as follows:—

(1) That the Assistant Native Commissioner's finding that defendant acted *mala fide* in giving Matazana in marriage is against the weight of the evidence and the probabilities of the case.

(2) That the Assistant Native Commissioner erred in giving judgment for the return of the seven original cattle which are dead or payment of their value, alternatively that the Native Commissioner erred in placing a value of £9 per beast on the seven original cattle which are dead, and the Court should have valued them as at the time they were paid over, that is, there being no evidence to the contrary, at the standard value of £5 per head.

(3) That the Assistant Native Commissioner erred in holding that defendant was not entitled to be reimbursed from the dowry of Matazana for the beast slaughtreed by him for her *ntonjane* ceremony and for the wedding outfit supplied by him. That accordingly these two beasts should have been deducted from the number found to be due to plaintiff.

The main facts in the case are not seriously disputed. They are as follows. Matazana is the daughter of Mampula who was the brother of plaintiff's father and of defendant's maternal grandmother. Plaintiff is heir of Mampula. The latter contracted leprosy at Kokstad many years ago when Matazana was about four or five years of age. He was committed to a leper institution. As his wife had died he wrote to defendant's mother, Mangwangwe, through the Magistrate, Tsolo, requesting her to fetch the child. She and her late husband did so. Matazana grew up at defendant's kraal, was *tombisaed* there and was given in marriage by him about 20 years ago. A beast was slaughtered for the *ntonjane* ceremony and a wedding outfit was provided. About 1947 she deserted her husband and went to plaintiff's kraal. She was restored to her husband when he *putumaed* her from defendant. The seven cattle, as described in the summons, were received for her as dowry. They are now all dead. Defendant

paid one of the increase to his brother Fountyi, who was *fakwaed* in her dowry. This beast, which has also died, had at least two increase at Fountyi's kraal. In addition there are five cattle, progeny of the original dowry cattle, in the possession of the defendant.

There can be no doubt that defendant knew of the existence of plaintiff and his family, but the Assistant Native Commissioner's findings that he knew he had no right to the girl's dowry and that his dealings with the cattle were *mala fide* are not supported by the evidence. Mangwangwe says that when she went to fetch the child, Mampula gave it to her and told her that his own people were afraid of leprosy and refused to take it. This evidence is not controverted in any way. It is quite possible that she was under the impression that he desired her to adopt the child, but it is not possible from the evidence to hold that this was Mampula's intention. If she had reported the matter to the Magistrate he could have ascertained Mampula's wishes. However, there is no appeal against the Native Commissioner's finding that there was no adoption. We must therefore presume that in asking Mangwangwe to look after the child Mampula intended that she should have the custody of it during his absence at the leper institution. But if Mangwangwe had told defendant, as she probably did, that the child had been given to her, it is not surprising that he thought he had the right to deal with her dowry as he pleased; and he was encouraged in this belief by the attitude of plaintiff and his family who, according to their own evidence, did not demand the dowry until about 17 years after they became aware of the marriage of the girl. A cautious man might have enquired into the girl's status when dealing with her dowry, but defendant's failure to do so cannot be regarded as unreasonable, having regard to the fact that her father had died and on the evidence, which we accept, no claim for the girl was made by plaintiff's people before the marriage. It was the duty of plaintiff and his people to exert any right they might have had timeously. The fact that they took no interest in the child for a period of about thirty years leads to the conclusion that they did not consider that they had any rights to her.

The fact that defendant dealt with the dowry in good faith does not, however, entitle him as of right to make deductions for the expenses incurred in connection with the girl's *ntonjane* and marriage. Such deductions may be made only if they had been incurred with the approval of the girl's guardian according to Native Law (see Wana *v.* Zokozoko and Ano.. 5 N.A.C. 94, also Ngubentombi *v.* Mnene, 4 N.A.C. 49). The Native Commissioner was therefore correct in refusing to deduct two cattle for the *ntonjane* and wedding expenses. The third ground of appeal consequently fails.

The Native Commissioner is correct in saying that a man who gives another man's daughter in marriage must account for the dowry in full to the person entitled thereto, but he is required to account only. Defendant was not acting as plaintiff's agent when he gave the girl in marriage. There was therefore no obligation upon him to report deaths or, on failure thereof, to replace (*vusa*) cattle which had died from old age, accident or natural causes. Defendant states that the original dowry cattle have all died and Matazana's husband, witness for plaintiff, states that he does not expect them to be still alive. There is no evidence as to when the last one died but, it is reasonable to presume, it was some years before the dowry was claimed by plaintiff, and at a time when defendant honestly believed that he had a right to deal with the cattle. As defendant has accounted for the dowry, the second ground of appeal must be sustained.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to one for plaintiff for six head of cattle or their value, £54, and costs.

For appellant: Mr. Mugglestone, Umtata.

For respondent: Mr. Hughes, Umtata.

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CASE No. 121.

MAJONGILE *v.* MPIKELELI.

UMTATA: 19th October, 1950. Before J. W. Sleigh, Esq. (President), Messrs. J. A. Kelly and R. A. Bowen, Members of the Court (Southern Division).

Refund of Dowry—Alternative value to be placed on the cattle.

Plaintiff, now respondent, obtained judgment for delivery of nine head of cattle and one horse, being a part refund of dowry paid in 1939. In 1939 the average value of cattle was £5 each. The Assistant Native Commissioner fixed the alternative value of the cattle at £9 each, that being the current average value in his district. On appeal it was argued for defendant that the alternative value should be the average value at the time the dowry was paid.

Held: That the Assistant Native Commissioner had correctly placed the current cash value on the cattle.

Appeal from the Court of the Native Commission, Tsolo.

Per Sleigh (President) (delivering the judgment of the Court):—

Plaintiff, now respondent, obtained judgment against defendant, now appellant, for delivery of nine head of cattle and one horse, being part refund of *lobolo* paid for appellant's daughter about the year 1939. The Assistant Native Commissioner fixed the alternative value of the cattle at £9 each. The appeal is solely against this point. It is contended that the alternative value should have been fixed at £5 per beast which was the average value of cattle at the time the dowry was paid.

According to custom a dowry is paid and refunded on a cattle basis. With the present-day scarcity of cattle it is not uncommon to pay part of the dowry in small stock and in cash, but when such payments are made they are always calculated as representing a certain number of cattle. The guardian of the girl may, of course, stipulate that a horse, small stock or cash be paid as part of the dowry, or that the dowry be paid wholly in cash as, for example, where the guardian resides in a town and has no place to run stock. In such cases he must, when required to refund the dowry, restore a horse, small stock or cash, as the case may be. But where there has been no such stipulation he must refund the dowry in cattle. On the same principle he is entitled to make the recognised deductions for the children and the wedding outfit in cattle.

In the present case the marriage was dissolved because of the misconduct of appellant's daughter. He is therefore liable, according to custom, to refund the *lobolo* paid for her. It is not disputed that respondent paid ten cattle and a horse as dowry and that there was one child of the marriage. He must therefore restore nine cattle and one horse or their current cash value. He cannot claim to refund the dowry in cash at the standard rate of £5 per beast.

This case emanates from Tsolo District and the uncontradicted evidence is that in that district the present average value of cattle of the type usually paid as dowry is £9 per head. The alternative value of the cattle as fixed by the Assistant Native Commissioner was therefore correct.

The appeal is dismissed with costs.

For appellant: Mr. Muggleston, Umtata.

For respondent: Mr. Hughes, Umtata.

CASE No. 122.

NGQELENI AND NGQUKUMBA *v.* VEMBE.

UMTATA: 20th October, 1950. Before J. W. Sleigh, Esq. (President), Messrs. J. A. Kelly and R. A. Bowen, Members of the Court (Southern Division).

Adultery and Seduction—Corporal punishment cannot be inflicted upon wrongdoer—Force may be used only to effect apprehension and detention of wrongdoer—Force must be no more than reasonable.

Our Courts cannot recognise a custom which allows a person to inflict corporal punishment upon his opponent. But a defendant in an action for damages for assault may justify the assault by showing that it was necessary to enable him to exercise a civil right which he has under Native Law. Under this law a man caught in adultery or found sleeping with a girl may be apprehended and detained by a member of the woman's family. The amount of force used must not exceed that which is reasonably necessary to effect the arrest.

Appellant having been sued in the Court below for seducing respondent's daughter counterclaimed for £50 damages for assault. He had been found sleeping with the girl and respondent struck him. He became unconscious and on regaining consciousness escaped to find that he had seven open wounds on his head, which caused him considerable pain. The Assistant Native Commissioner gave a judgment of absolution from the instance at close of appellant's case.

Held: On appeal, that appellant had received seven injuries when one or at the most two blows would have been sufficient to force him to submit; that on the evidence unnecessary injuries causing pain and suffering were inflicted by respondent that a reasonable man *might* have found for appellant and that the appeal be allowed.

Mhatali *v.* Mjivacu and Others, 1939 N.A.C. (C. & O.) 54 not followed.

Per Sleigh (President) (delivering the judgment of the Court):—

Plaintiff (now respondent) sued appellant and his kraalhead for three head of cattle or their value, £15, as fine for seduction of respondent's daughter. In the plea the seduction was admitted and the claim was settled after it had been reduced to one beast or £5.

Appellant counterclaimed for £50 as damages for assault. Respondent in his plea to the counterclaim admits that he assaulted appellant, but pleads provocation and that he went no further than was reasonably necessary in the circumstances.

The onus was, of course, on appellant to prove damages. According to his evidence, he was friendly with respondent's daughter and used to have carnal connection with her. On the evening of 18th July, 1949, he met her and took her to a spot about 500 yards from respondent's kraal where they were intimate. They were lying together completely covered with a blanket when he heard footsteps. When he uncovered himself he was struck on the head and after jumping up fell unconscious. He says it was a dark night and he does not know whether respondent was alone or not, but when he regained consciousness respondent was dragging him to his kraal and there were then other people with him. Near respondent's kraal he broke away and escaped, and when he arrived at his home he found that he had seven open wounds on his head. The district surgeon who examined him eight months later, found that one wound penetrated to the skull, but that there was no permanent disability. Although appellant spent four days in hospital there is no evidence that he incurred any medical expenses, and in view of the compromising circumstances in which he was found, he cannot complain that his dignity has been impaired. But he says that the wounds were very painfull for five days and the district surgeon agrees that this would have been so. Appellant has therefore discharged the onus which rested on him.

No evidence was led on behalf of respondent. According to the Assistant Native Commissioner's reasons absolution judgment was granted on application at the close of appellant's case,

One of the reasons for the absolution judgment is that there is no evidence that respondent inflicted the first or any of the other wounds. The Assistant Native Commissioner says that appellant admits that other people were present when he was felled. This is not so. As I have already indicated his words were "When I was assaulted I am unable to say whether Sukaze (respondent) was alone or not". Since respondent admits the assault it was for him to explain the position if he were not responsible for all the wounds.

Another reason for granting the absolution judgment is that it is the duty of members of a family to protect their females and any mishandling received by a person caught in adultery cannot form the subject of a complaint when the injuries received are not of a serious and grievous nature. Reliance is placed on Mkatali *v.* Mjwacu and Others [1939 N.A.C. (C. & O.] 54).

At the request of counsel for appellant the Native assessors were asked whether Native custom permitted an assault upon a man found sleeping with an unmarried girl. As will be seen from their opinion which is annexed, an adulterer may be assaulted and even maimed. A seducer may also be assaulted, but the assault on him takes the form of chastisement. Native custom thus allows physical punishment upon a seducer or an adulterer and the person who inflicts the punishment is the person wronged or his male relatives. He is permitted to take the law in his own hands and revenge himself upon the wrong-doer without incurring any civil or criminal liability.

Our Courts cannot, however, recognize a custom which allows a person to inflict corporal punishment upon his opponent. But a defendant in an action for damages for assault may justify the assault by showing that it was necessary to enable him to exercise a civil right which he has under Native law. Now under this law a man who is caught in adultery or who is found sleeping with a girl may be apprehended and detained by a member of the woman's family, and in order to effect such arrest and detention the member may use reasonable force. It is not possible nor desirable to attempt to lay down what force would be regarded as reasonably necessary. This must, of course, depend on the circumstances of each case. But generally speaking where the man caught in compromising circumstances resists arrest, and *a fortiori* where he attacks the member who attempts the arrest, and in the resultant struggle receives a number of even serious injuries, the Court will not draw a nice distinction as to whether the force used was reasonably necessary. But it is clear that if a serious injury is inflicted with a dangerous instrument, the person who inflicted the injury would be civilly liable (Hashi *v.* Dumezweni & Ano., 4 N.A.C.), unless, of course, such person is defending himself and is himself in danger of being seriously injured. Moreover, the amount of force used must not exceed that which was reasonably necessary to effect the arrest. In other words the person effecting the arrest may not take advantage of the opportunity to batter an unconscious man or one who willingly submits to the arrest. The circumstances may be such that even a single blow may be unnecessary.

In the present case appellant received seven injuries when one or at the most two blows would have been sufficient to force him to submit. On the evidence unnecessary injuries were inflicted by respondent and as appellant suffered considerable pain he is entitled to some compensation. In the circumstances a reasonable man *might* have found for appellant. The Assistant Native Commissioner therefore erred in granting absolution judgment at the close of appellant's case.

The appeal is allowed with costs, the judgment of the Court below is altered to read "The application for absolution judgment is refused" and the record of the proceedings is returned to the Court below for further hearing and a fresh judgment.

For appellant: Mr. Chisholm, Umtata.

For respondent: Mr. Airey, Umtata.

NATIVE ASSESSORS OPINION.

1. Headman Ntabezulu Mtirara, Umtata.
2. Chief Bazindlovu Holomisa, Mqanduli.
3. Chief Hlatikulu Mtirara, Engcobo.
4. Charlie Mananga, Qumbu.
5. E. C. Bam, Tsolo.

Bam.—When a man is caught in adultery he may be thoroughly assaulted and even maimed.

He may even be assaulted if the man offers to pay.

If a man is caught with an unmarried woman he may be beaten to punish him.

You do not maim him, you just chastise him. You may strike him on the head or any part of the body.

Other assessors agree.

CASE No. 123.

MOLEFE *v.* SONDLO.

KINGWILLIAMSTOWN: 16th November, 1950. Before J. G. Pike, Esq. (Acting President). Messrs. C. A. Key and B. G. Fenix, Members of the Court (Southern Division).

Malicious prosecution—Essentials—Duty of prosecutor—Malice.

It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action—his duty is not to ascertain whether there is a defence but whether there is reasonable and probable cause for a prosecution.

Defendant (respondent in this Court and complainant in the criminal case), alleged that he lost a goat and that he recognised its skin at a shop. The shop-keeper informed defendant that the plaintiff had sold it to him. Plaintiff was prosecuted and acquitted. He then sued defendant alleging that he had no reasonable and probable cause to institute proceedings in that plaintiff had failed to approach him for an explanation and that he had not in fact, sold the skin to the shop-keeper. Evidence was adduced in regard to alleged malice: The Native Commissioner having entered a judgment of absolution from the instance at the end of plaintiff's case, plaintiff appealed.

Held: That there was no evidence that defendant did not have reasonable cause for instituting the prosecution and that the evidence failed to show that there was any malice.

Appeal accordingly dismissed.

Appeal from the Court of the Native Commissioner, Lady Frere.

Per Pike (Acting President) delivering the judgment of the Court:—

This is an action in which plaintiff claimed £100 as damages for malicious prosecution. Judgment of absolution from the instance was entered at the close of the plaintiff's case.

The plaintiff has appealed on the following grounds:—

"(1) That the judgment is against the weight of evidence and is not supported therby.

(2) That the Assistant Native Commissioner erred in granting absolution without hearing the defendant's evidence as there is evidence on record on which a reasonable man might find for the plaintiff."

In this Court counsel for appellant withdrew the first ground of appeal.

It is common cause that plaintiff was prosecuted for the theft of defendant's goat, that it was defendant who set the law in motion and that the plaintiff was acquitted.

The evidence discloses that defendant alleged he had lost a goat, that some days later he went to the Qoqodola shop and there saw what he claimed to be the skin of his missing goat. The shopkeeper informed him that that skin had been sold to him by plaintiff who, in his evidence, denies that fact. There is nothing on record to prove that the skin is not the property of defendant.

In an action of this nature the plaintiff must prove—

(1) that the defendant instituted the proceedings;

(2) that the defendant acted without reasonable and probable cause;

(3) that the defendant was actuated by malice; and

(4) in the case of certain classes of proceedings that the proceedings terminated in his favour (see The Law of Delicts—McKerron—pages 295 and 296).

The facts under (1) and (4) are established by defendant's admissions in his plea. He will be liable in damages if it can be show that he acted maliciously and without reasonable and probable cause and the onus of establishing this lies on the plaintiff (see Maasdorp's Institutes of South African Law, 4th Edition, Vol. IV, page 118).

In his attempt to discharge this onus the plaintiff's evidence was to the following effect:—

(*a*) That he does not believe that the defendant lost a goat.

(*b*) That some time previously defendant wanted to hire plaintiff to build a hut but plaintiff was unable to do so as he was otherwise occupied.

(*c*) That defendant has a dislike for one Ernest Ntyobile, with whom plaintiff lives and that defendant wanted to use plaintiff as a means of causing injury to Mtyobile.

There is no evidence whatever to support plaintiff's belief that defendant did not, in fact, lose a goat.

In regard to (*b*) the plaintiff admitted in cross-examination that he noticed no change in defendant's attitude towards him after he declined to build the hut.

In so far as (*c*) is concerned the evidence does not disclose that there is any enmity or hatred on the part of defendant towards Mtyobile—nor does it indicate in what way Mtyobile would be injured by the prosecution of plaintiff.

Mtyobile and plaintiff are apparently not related and their only association is that they both are living temporarily at the kraal of Mrs. Vanqa.

The plaintiff stated in the course of his evidence:—

> "I say defendant had no reasonable and probable cause because he did not come to me first after hearing that I had sold a skin at the shop. I noticed no change in defendant's attitude when I refused to build his hut. I saw the skin produced in Court at the previous trial. It was not the skin which I sold at the shop. I heard Stanislaus say that it was the skin that I had sold him. That evidence was not the truth."

It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action—his duty is not to ascertain whether there is a defence but whether there is reasonable and probable cause for a prosecution (see McKerron —The Law of Delicts, page 297).

There is thus no evidence to show that defendant acted without reasonable and probable cause and with malice—on the contrary the evidence tends to show that defendant had no motive (malice) in instituting a false charge against plaintiff and that he had reasonable cause for instituting the prosecution.

The appeal is dismissed with costs.

For appellant: Adv. Miss Egan, instructed by Mr. W. M. Tsotsi, Lady Frere.

For respondent: Mr. Kelly, Lady Frere.

CASE No. 124.

TIKILE *v.* FIGLAN AND ESTATE FIGLAN.

KINGWILLIAMSTOWN: 16th November, 1950. Before J. G. Pike, Esq. (Acting President), Messrs. C. A. Key and B. G. Fenix, Members of the Court (Southern Division).

Succession—Enquiry under Government Notice No. 1664 of 1929—Procedure to be adopted—Fundamental principles of justice not to be violated—Substantial prejudice to appellant.

The late Naomi Figlan having died, a dispute arose between her family and one Tikile over the right to succeed. Tikile gave evidence before the Native Commissioner and was cross-examined by the family's lawyer. Lillian Figlan gave evidence but there was no evidence that Tikile was permitted to cross examine her. On behalf of the Figlan family further evidence which was not put in at the enquiry was admitted on affidavit. The Estates Clerk prepared a statement expressing his opinion, which was placed before the Native Commissioner who thereupon instructed that the deceased's eldest surviving brother be appointed heir. Tikile appealed.

Held: That the procedure adopted constituted a gross irregularity resulting in substantial prejudice to the appellant, and that the appeal should therefore be allowed.

Moshesh *v.* Moshesh, 1936 N.A.C. (C. & O.), page 73).

Nobaza *v.* Nobaza, 1945 N.A.C. (C. & O.), page 85).

Poswayo *v.* Tshatshu, 1947 N.A.C. (C. & O.), page 110.

Tswela *v.* Tswela 1948, N.A.C. (S.D.), page 41.

Ntozini *v.* Ntsume, 1948 N.A.C. (S.D.), page 42, discussed or referred to.

Appeal from the Court of the Native Commissioner, Salt River.

Per Pike (Acting President) delivering the judgment of the Court:—

This is an appeal against the finding of the Native Commissioner, following an enquiry held under the provisions of Government Notice No. 1664 of 1929.

The late Naomi Figlan died on the 8th April, 1950, at Cape Town where she had resided for the past 23 years. Various members of the Figlan family asserted that she was unmarried whereas Daniel Tikile contended that he had married the deceased by native law and custom and was therefore entitled to succeed to her property. There was thus a dispute within the meaning of section *twenty-three* (4) of Act No. 38 of 1927.

On the 21st April, 1950, there appeared before the Native Commissioner, Daniel Tikile, Lillian Figlan and Solomon Figlan. The Native Commissioner forthwith proceeded to hold an enquiry as he states "under regulations, Government Notice No. 1664 of 1929". The section of the regulations is not stated but as there was a dispute it must be assumed that he acted in terms of section *three* (3). Evidence was given by Daniel Tikile who was cross-examined by Mr. Sutton, attorney representing the Figlans. Lilian Figlan then gave evidence but there is no indication that Tikile was permitted to cross-evamine her. The record does not reveal what transpired at the conclusion of Lilian's evidence—no postponement is recorded.

Between the 21st April, 1950, and the 20th July, 1950, various affidavits by persons claiming to have knowledge of the matter were filed. The affidavits all purport to refute the claim of Daniel Tikile. On the latter date the estates clerk

prepared a précis showing the facts as disclosed by the estates file and his opinion on those facts. This précis and statement of opinion he placed before the Native Commissioner, who on the 26th July, 1950, endorsed thereon the following finding:—

> "In my judgment deceased was unmarried. Her three children therefore illegitimate, and the heir to her intestate estate, according to Native law and custom, her eldest surviving brother Nimrod (her father being dead). Appoint him accordingly. Tikile should be notified."

It should here be pointed out that Nimrod was never a claimant, or a party to the proceedings. The Native Commissioner in his reasons for judgment acknowledges that Nimrod was wrongfully declared heir as his deceased elder brother has a son.

Against this finding Daniel Tikile appealed, the grounds of which may be summarised, as follows:—

That the Native Commissioner erred—

(1) by not allowing Daniel Tikile to cross-examine the witness Lilian;

(2) by relying upon the affidavits filed of which appellant had no knowledge and no opportunity of filing replying affidavits.

The Native Commissioner in his reasons for judgment makes it clear that he relied upon information furnished in the affidavits and other documents which were never put in as evidence at the enquiry. He quotes as justification for his action the following passage from—

"Native Courts Practice" by C. H. Blaine, at page 177:—

> "Proceedings under this Rule are in the nature of an administrative enquiry with a special provision under the regulations for the award of costs by the Native Commissioner and for an appeal to the Native Appeal Court. These enquiries need not be conducted with such a strict compliance with the rules of procedure and relevancy and admissibility of the law of evidence as is necessary in the conduct of ordinary civil or criminal trials. The enquiry must be fair and impartial and not depart from or violate the fundamental principles of justice. There may be cases where a wrong admission or exclusion of evidence may render the hearing unfair, or may amount to a disregard of a term of the statute, but the Court would then intervene because of the result, not because a rule of evidence had been disregarded."

It is difficult to understand how the Native Commissioner could regard his actions as not departing from or violating the fundamental principles of justice.

The Native Commissioner has, moreover, shown a disregard for the many decisions of this Court which set out clearly the nature of the duty imposed by section *twenty-three* (4) of the Act and the manner in which that duty must be carried out.

In Bernice Moshesh *v.* Nkoebe Moshesh, 1936 N.A.C. (C. & O.), at page 73 it was stated:—

> "It would seem that the use of the word 'shall' in line three of sub-section (4) of section *twenty-three* of Act No. 38 of 1927 is merely directory imposing a public duty on the Native Commissioner and section *three* (3) of Government Notice No. 1664 of 1929 instructs him how to go about that duty.
>
> In Samuel Nobaza *v.* Edmund Nobaza, 1945 N.A.C. (C. & O.), at page 85, Sleigh, President, said 'now, section *three* (3) of Government Notice No. 1664 of 1929 provides that the Native Commissioner shall summon before him the parties concerned and such witnesses as he may consider necessary. The duty is therefore thrown on the Native Commissioner to summon the witnesses and where it can be shown that the Native Commissioner knew or ought to have

known after enquiry, that there were witnesses who could give material evidence on the matter in dispute, and that the appellant has suffered substantial prejudice as a result of the Native Commissioner's failure to call such witnesses, then this Court will not hesitate to send the case back for further evidence."

In Thomas Poswayo *v.* Caswell Tshatshu, 1947 N.A.C. (C. & O.), at page 110, the following passage occurs:—

"The procedure to be followed is that prescribed in the regulation itself which contemplates that the evidence should be adduced, and the presiding officer's finding should be given in the presence of the parties, or, at any rate, that the parties should be given a reasonable opportunity of being present."

Attention is also directed to the decisions in Wana Tswela *v.* Dafi Tswela, N.A.C. (S.D.) 1948, page 41, and Nomeva Ntozini *v.* Mabuti Ntsume, N.A.C. (S.D.) 1948, page 42.

There is no doubt that the procedure adopted by the Native Commissioner constituted a gross irregularity which resulted in substantial prejudice to the appellant. The appeal must therefore succeed.

In regard to costs, the respondent Nimrod Figlan was not a party to the proceedings and costs cannot be awarded against him. Counsel for appellant agreed that no order should be made.

The appeal is allowed, the finding of the Native Commissioner is set aside and the enquiry must be commenced *de novo*.

There will be no order as to costs.

For appellant: Mr. Stanford, Kingwilliamstown.

For respondent: Mr. B. G. Barnes, Kingwilliamstown.